affront to federal-state comity" and "state sovereignty." Pet. 12. But the interplay of state and federal sentencing intentions simply reflects the fact that each sovereign is entitled to decide whether its punishment should be cumulative of the other's. This case illustrates that the later-sentencing sovereign often has an advantage in effectuating its goal. If the state court had not vacated its initially-imposed sentence, petitioner would have been "already subject" to an undischarged state sentence at the time of his federal sentencing. Thus, but for the state court's actions, the federal court would have had the ability, even under petitioner's view of Section 3584(a), to order the federal sentence to run consecutively to the state sentence—despite the state court's previous (and still extant) decision that the state sentence should run concurrently. Such a federal sentence would have had, if anything, greater implications for the state court's ability to effectuate petitioner's state plea agreement (see Pet. 12-13) than the sentence that the federal court did impose. The interpretation of Section 3584(a) adopted by the court below thus does not significantly add to any federalism tensions created by the statute.

2. In any event, this case is not a suitable vehicle to resolve the conflict among the courts of appeals. Petitioner is currently serving his federal sentence and has not been resentenced on his state murder conviction. See Pet. 4; note 1, *supra*. The state court has indicated that it will seek to impose a sentence that will run concurrently with the instant federal sentence. Moreover, the federal court, despite its stated intent that the federal sentence run consecutive to any state sentence, expressly recognized that the state court could take steps "[t]o put itself in a position to sentence [peti-

tioner] concurrently." 9/1/04 Tr. 16. Accordingly, it is at best unclear how the state and federal sentences will interact. Indeed, given that the state court will have the last word on the issue, the state court's resentence could render irrelevant the district court's order that its sentence run consecutive to the state sentence.[4] At bottom, any claim of harm to petitioner from the order of consecutive sentences is speculative.

Moreover, petitioner may not obtain the relief he seeks even if this Court were to adopt the rule he advocates with respect to the construction of 18 U.S.C. 3584(a). As petitioner notes (see Pet. 25), the state court may resentence petitioner while this case is pending. In that event, if this Court were to adopt the rule he advocates, vacate the judgment of the court of appeals, and remand the case for resentencing, petitioner would be "already subject to an undischarged term of imprisonment," 18 U.S.C. 3584(a), (*i.e.* his state prison sentence) at the time of imposition of his federal sentence. Accordingly, even under petitioner's reading of Section 3584(a), the district court would be free in that circumstance to order that the federal sentence run consecutively to the state sentence.[5]

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[4] It is an open question whether the state court could order its sentence to run concurrent with petitioner's seven-year sentence for the Section 924(c)(1)(A) conviction, which Section 924(c)(1)(D)(ii) requires be consecutive to any other sentence. See *Gonzalez*, 520 U.S. at 11.

[5] Petitioner suggests that, if the Court were to hold that the district court lacked the authority to run its sentence consecutively to an unimposed state sentence, "that error could be remedied simply by striking that designation from the sentence of the trial court," without the need to remand for resentencing. Pet. 25. If the Court were to adopt petitioner's construction of Section 3584(a), however, a remand for resentencing would be appropriate to allow the district court to reconsider its entire sentence in light of the Court's ruling. The district

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

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court here might, for example, want to reconsider its order running the sentences on the Hobbs Act and Section 922(g)(1) counts concurrently if this Court were to hold that it lacked the authority to run the federal sentence consecutively to a future state sentence. Cf., *e.g.*, *United States* v. *Rivera*, 327 F.3d 612, 614-615 (7th Cir.) (holding that, where appellate court has reversed the conviction on one count, district court on remand can refashion the sentence on the remaining count to run it consecutively to a prior undischarged sentence even though, before the appeal, it had ordered the sentence to run concurrently), cert. denied, 540 U.S. 922 (2003); *United States* v. *Moreno-Hernandez*, 48 F.3d 1112, 1116-1117 (9th Cir.) (holding that, on remand for resentencing, district court may reconsider entire, interrelated sentencing package), cert. denied, 515 U.S. 1151 (1995); see also 28 U.S.C. 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

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No. 05-454

IN THE

# Supreme Court of the United States

William A. Cox,
*Petitioner*,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

The United States does not seriously dispute that the question presented by this case cries out for resolution by this Court. Like the Tenth Circuit in the decision below, see Pet. App. 2a, the government acknowledges that the courts of appeals are intractably divided over a district court's power to require that its sentence run consecutively to an unimposed term of imprisonment, see BIO 5. Moreover, the government does not dispute either that the question presented arises in countless cases, both on direct appeal and in federal post-conviction proceedings, or that it persistently results in different treatment for otherwise similarly situated defendants – here, for example, likely causing petitioner to serve an additional fourteen years in prison merely because he was sentenced in the Tenth Circuit rather than the Sixth or Ninth. See Pet. 9-10 nn.3-4 (citing cases). Indeed, as the government itself emphasizes, the question presented has been the subject of multiple petitions for certiorari. See BIO 6 n.3. Far from being a reason to deny certiorari, the fact that this Court has been repeatedly presented with petitions on this issue demonstrates that the conflict is real and important, and that certiorari is thus warranted. The government does not contend that the issue would benefit from further percolation in the lower courts; the question has, in fact, been thoroughly examined in the lower courts, resulting in a division that has not resolved itself in the almost fifteen years since it first arose. Thus, the government does not dispute that the conflict can only be resolved through this Court's intervention. Even with respect to the merits, the government does not dispute that the decision below is incorrect, conferring upon the district courts a power that Congress specifically withheld under the plain text of 18 U.S.C. 3584(a).

Instead, even though the case plainly satisfies each of this Court's criteria for granting certiorari, the government proffers a series of arguments that boils down to two main points: (1) there will *never* be an appropriate vehicle for this Court to

resolve the circuit split on the question presented, which in the government's view should forever evade review; and (2) in any event, certiorari is not warranted because even if the Tenth Circuit and like-minded courts have wrongly permitted district courts to usurp the authority of state courts to decide whether their later-imposed sentences shall be concurrent or consecutive to a prior federal sentence, the state courts can – through various machinations and in particular circumstances that irregularly recur – circumvent that erroneous holding to re-establish the balance of sentencing authority Congress intended. Neither argument undermines the compelling reasons for this Court to grant review.

1. As noted above, the United States does not dispute that petitioner's construction of Section 3584(a) is the correct one – *viz.*, that Section 3584(a) does *not* authorize a district court to impose a sentence that is consecutive to an as-yet-unimposed term of imprisonment. At most, the government suggests that the error *might* be inconsequential "*if* the Seventh and Tenth Circuits' view is correct" that the final sentence of Section 3584(a) establishes a presumption that multiple terms of imprisonment imposed at different times run consecutively unless the district court affirmatively orders that they run concurrently. See BIO 5-6 n.2 (emphasis added) (citing *Romandine* v. *United States*, 206 F.3d 731, 737-38 (CA7 2000), and *United States* v. *Williams*, 46 F.3d 57, 59 (CA10), cert. denied, 516 U.S. 826 (1995)). That is, the United States suggests that, even if district courts are prohibited from ordering consecutive sentences, they can nonetheless "achieve the same result simply by not ordering that the sentences be concurrent." *Ibid.*

Even that tepid defense of the holding below fails. First, the government does not actually argue that the view of the Seventh and Tenth Circuits *is* correct. In fact, as the petition explained and the government does not dispute, the Bureau of Prisons has concluded that it is *not*. See Pet. 7-8 & 20 n.9. That rejection is well-founded, for the reasons explained by at least two of the circuits. See BIO 5-6 n.2 (citing *Abdul-Malik*

v. *Hawk-Sawyer*, 403 F.3d 72, 75 (CA2 2005); *United States* v. *Quintero*, 157 F.3d 1038, 1040 (CA6 1998)). Those circuits hold instead – in rulings that only amplify the circuit conflict – that the presumption created by the last sentence of Section 3584(a) applies only to cases in which the other sentence has already been imposed. Put another way, in those circuits, the "court" that must determine whether to "order[] that the terms are to run concurrently" is the second sentencing court; only if the second sentencing court declines to order explicitly that the sentences run concurrently is the presumption triggered. See, *e.g.*, *Quintero*, 157 F.3d at 1041 ("The language neither abrogates the requirement that to run consecutively there be an undischarged sentence or sentences imposed at the same time nor expands a district court's authority * * *."); *Abdul-Malik*, 403 F.3d at 75 (final sentence of Section 3584(a) does not apply to cases in which federal sentence is imposed before imposition of the state sentence).

2. The United States also argues that, although numerous circuits erroneously permit a district court to order that its sentence run consecutively to an as-yet-unimposed state sentence, that error is unworthy of correction by this Court. This is so, the government argues, because even if Congress intended to permit the later court to determine whether its sentence would be concurrent or consecutive to the prior federal sentence, state courts in certain circumstances may be able to circumvent the federal court's illegal usurpation of that authority through various schemes and manipulations. The United States contends, for example, that when a defendant is in federal custody and the state wishes to ensure that its sentence is served concurrently, the state can conceivably do so by designating the federal institution for service of the state sentence. See BIO 7. And when a defendant is in state custody, the state court can effectively make the state sentence concurrent by reducing or suspending it, while the state can also seek to have the federal BOP designate the state prison as the place of service for the federal sentence. *Ibid.* Even assuming that states will in some cases seek to circumvent a

federal court's designation of a sentence as consecutive – and, as the petition noted (at 14), such cases are rare – both of the government's contentions are flawed.

First, in the case of defendants in federal custody, even if states may wish to designate a federal institution for service of a state sentence, there is no guarantee that state law would permit such a designation. To the contrary, there is a serious argument (adopted by some courts) that such a designation may be made only by the federal Bureau of Prisons, see, *e.g.*, *Commonwealth* v. *Mendoza*, 730 A.2d 503, 504 n.2 (Pa. Super. Ct. 1999) ("The decision of whether a federal prison in which an appellant is serving his federal sentence may be designated as a place of state confinement is to be made by the Federal Bureau of Prisons.").

Second, in the case of defendants in state custody, as the petition explained – and the government does not dispute – the BOP deems itself bound to follow the *federal* court's designation of its sentence as consecutive and thus will refuse state requests that it designate a state facility as the place of federal confinement. See Pet. 7-8 (citing B.O.P. Program Statement 5160.05 ¶ 9(b)(4)(f)). Moreover, mandatory minimum sentences may preclude state courts from rendering a sentence effectively concurrent by reducing or suspending it. See Pet. 12.

More importantly, even when such machinations are available, requiring state courts to manipulate their sentencing or petition the Bureau of Prisons for a favor to obtain Congress's intended result is a violation of comity that warrants correction by this Court. The United States seeks to downplay this substantial affront to state sovereignty, asserting that because each sovereign is entitled to decide the appropriate punishment for a particular defendant, "[t]he interpretation of Section 3584(a) adopted by the court below * * * does not significantly add to any federalism tensions created by the statute." BIO 8. The government's position thus boils down to the contention that in a system of dual sovereigns, some

conflict may be inevitable. That contention, however, presupposes that Congress intended to create such a conflict, and every indication from the legislative history (none of which the government addresses, much less disputes) is that it did not. See Pet. 22-24. Nor does the government offer any reason why such a conflict should be exacerbated – which is the unavoidable result of its construction – when petitioner's construction of Section 3584(a), which is the one Congress intended, minimizes the conflicts.

Finally, with its single-minded focus on the prospect that *states* could circumvent a federal court's designation of a consecutive sentence, the government has no answer to the petition's postulation (at 12) that such a designation is unquestionably binding on later *federal* sentencing courts. Thus, the government offers no way by which a second federal court could respond to a prior federal court's erroneous assertion of authority to determine that the two federal sentences should run consecutive to one another. Although the federal system may be one of "dual sovereignty" (BIO 6), the question presented turns on a statutory text that does not distinguish between federal and state sentences.

3. That this Court has previously denied certiorari in other cases involving the same question is no indication that "[r]esolving that conflict is unnecessary." BIO 6 & n.3. As the Solicitor General explained in each of the three cases he cites, each of those cases suffered vehicle problems that posed potentially substantial impediments to reaching the question presented: none involved an express order by the state court that the petitioner's sentence run concurrently to his federal sentence, and the petitioner in No. 04-9286, *Lackey* v. *United States*, conceded that he failed to object in the district court to the order designating his sentence as consecutive.

4. The government asserts that this case, too, presents an inadequate vehicle for resolving the division among the courts of appeals. See BIO 8-9. But the only objections the government is able to muster would apply equally to almost any

case in which the question arises and would, if accepted, permit the square circuit conflict presented by this case to forever evade review.

According to the United States, every case in which the issue is presented comes either too early or too late. Thus, the government first argues that certiorari is not warranted because petitioner's state sentence has not yet been imposed, such that it is "unclear how the state and federal sentences will interact." BIO 8-9. However, as the petition explained, the state court specified that it intends petitioner to serve a forty-eight-year concurrent sentence; if certiorari is granted and this Court adopts the rule of the Sixth and Ninth Circuits, the state court will impose that concurrent sentence and will no longer need to take any drastic steps to ensure that its sentence is carried out.

In substantial tension with its argument that certiorari is not warranted because petitioner's state sentence has not yet been imposed, the government next argues that certiorari should be denied because, even if this Court vacated the judgment below and remanded for resentencing, petitioner would be "already subject to an undischarged term of imprisonment" if he has been subsequently sentenced by the state court; as such, the district court could, on remand, then order that its sentence be served consecutively to the state term. This argument is completely speculative: as the government acknowledges, see BIO 3 n.1, petitioner has not yet been sentenced. But given the very strong likelihood that most other defendants will have been sentenced by the time this Court considers and disposes of a case, certiorari is nonetheless warranted because the question presented is "capable of repetition yet evading review." See, *e.g.*, *Olmstead* v. *L.C.*, 527 U.S. 581, 594 (1999).

The government finally suggests that certiorari is not warranted because, if this Court were to adopt petitioner's construction of Section 3584(a), it is possible that the district court on remand might impose a longer sentence – for exam-

ple, running petitioner's seven-year sentences for his Hobbs Act and Section 922(g)(1) counts consecutively instead of concurrently – to compensate for its inability to order a sentence consecutive to a future state sentence. See BIO 9-10 n.5. That, of course, will be true in almost any case in which this Court will have an opportunity to resolve the circuit split; if the Court were to wait for a case in which the district court will have no power to adjust the petitioner's sentence on remand, the important question presented here will never be resolved. In any event, if this Court resolves the question presented in petitioner's favor and the state court subsequently re-imposes the forty-eight-year concurrent sentence, even a substantially longer federal sentence (such as the twenty-one-year sentence posited by the government) would not affect the overall time served by petitioner.[1]

5. Finally, even if this Court determines that there is some doubt whether this case is an appropriate vehicle to consider the question presented, the appropriate remedy is not to deny certiorari but instead to hold the case pending this Court's consideration of the forthcoming petition for certio-

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[1] The government contends for the first time in this Court that it is an "open question whether the state court could order its sentence to run concurrent with petitioner's seven-year sentence for the Section 924(c)(1)(A) conviction, which Section 924(c)(1)(D)(ii) requires be consecutive to any other sentence," see BIO 9 n.4 (citing *United States* v. *Gonzalez*, 520 U.S. 1, 11 (1997)). The government's contention was not only waived but is also irrelevant to the question presented – viz., whether a *federal* court can order that its sentence run consecutive to an as-yet-unimposed state sentence. Moreover, even if the state court were precluded from ordering that petitioner's sentence run concurrent with his Section 924(c)(1)(A) conviction, that court would not be precluded from ordering his sentence to run concurrent with his remaining federal counts – which represent half of his fourteen-year federal sentence. The net result of such an order, of course, would be a total sentence that was seven years shorter than it would be if the federal court's designation of petitioner's sentence as consecutive were given effect.

rari in No. 05-___, *Pierce* v. *Fleming*, CA5 No. 04-10987, 2005 U.S. App. LEXIS 22266 (Oct. 14, 2005).[2] Because counsel to the petitioner in this case also represent the petitioner in *Pierce*, the Court could efficiently grant certiorari in both cases and consolidate them for argument.

Like the petitioner in this case, the petitioner in *Pierce* entered into a state plea agreement that was contingent on his receiving a concurrent sentence, and the proper construction of Section 3584(a) was squarely presented in the courts below. Moreover, Pierce served his state sentence first before being paroled into federal custody, only then to discover that the BOP would not honor the state court's determination that his state sentence should run concurrent to the prior federal sentence. As a result, a decision in his favor would indisputably inure to his benefit. Moreover, there is no indication that the state sought to circumvent Pierce's consecutive sentence; to the contrary, when Pierce sought to have his state sentence vacated to ensure that he would receive the benefit of his plea agreement, the state judge expressly indicated that he lacked the power to modify the state sentence to circumvent the federal court's order that the state and federal sentences be served consecutively.

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[2] The petition in *Pierce* will be filed within a day of this Reply Brief and will in addition be available on SCOTUSblog, *www.scotusblog.com*.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted. In the alternative, the Court should hold this petition pending the disposition of the petition for certiorari in *Pierce* v. *Fleming*, *supra*.

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